

IN THE

Supreme Court of the United States

October Term 1945—No. 378

AMERICAN BOWLING & BILLIARD
CORPORATION,

Petitioner,

vs.

THE BRUNSWICK-BALKE-COLLENDER
COMPANY,

Respondent.

PETITION OF AMERICAN BOWLING & BILLIARD
CORPORATION FOR A WRIT OF CERTIORARI
TO THE CIRCUIT COURT OF APPEALS FOR THE
SECOND CIRCUIT, WITH BRIEF IN SUPPORT
THEREOF.

SAMUEL E. DARBY, JR.,
Counsel for Petitioner.

WILLIAM S. GLUCK,
WALTER A. DARBY,
Of Counsel.



INDEX

	PAGE
Petition	1
Summary and Short Statement of the matter involved..	1
The Questions Presented.....	7
Anti-Trust Law—Federal Trade Commission.....	9
1. Did the amendment to the Federal Trade Commission Act which made “final” <i>all</i> judgments or orders of the Commission if not appealed from within a prescribed period of time, leave non-final or interlocutory an order or judgment of the Commission in a proceeding which decreed that the respondent in that proceeding had violated the Clayton Act?	
2. Was it necessary to amend the Clayton Act in order to give finality to a judgment of the Commission (which was acquiesced in) that the respondent before it had violated the Clayton Act, when the amendment to the Federal Trade Commission Act made final <i>all</i> judgments of the Commission which were not appealed from?	
3. Was a judgment of the Federal Trade Commission entered on December 7, 1942, in the proceeding by the Commission against respondent for violation of Section 3 of the Clayton Act, entitled to receipt in evidence on petitioner’s offer, and entitled to the <i>prima facies</i> prescribed by Section 5 of the Clayton Act?	
The Trade-Mark Issue.....	10
When it is established by the evidence and the findings of the Trial Court that there is not and cannot be any confusion between the goods of petitioner and respondent with their respective trade-marks thereon, either to the purchasers or users of those goods (constituting the entire “trade” therefor), can there be trade-mark infringement?	

	PAGE
Reasons relied upon for the grant of the writ of certiorari	11
Brief in support of the petition for writ of certiorari....	12
Opinions of the Courts below	12
Jurisdiction	12
Statement	13
Specification of errors	13
Argument	13
Conclusion	15

Appendix:

Section 5 of the Clayton Act (15 U. S. C. 16)	16
Section 11 of the Clayton Act (15 U. S. C. 21)	16
Amendment of March 21, 1938 to the Federal Trade Commission Act (15 U. S. C. 45(g)(1))	20

Cases Cited.

Hurn v. Oursler, 289 U. S. 238	12
Moore v. N. Y. Cotton Exchange, 270 U. S. 593	12
Propper v. John Beney & Sons, 295 Fed. 729	7
Stark Bros. Nurseries & Orchard Co. v. Stark, 255 U. S. 50	12
Sterling v. Constantin, 287 U. S. 378	12

IN THE

Supreme Court of the United States

October Term 1945—No.

AMERICAN BOWLING & BILLIARD CORPORATION,
Petitioner,

vs.

THE BRUNSWICK-BALKE-COLLENDER COMPANY,
Respondent.

**PETITION OF AMERICAN BOWLING & BILLIARD
CORPORATION FOR A WRIT OF CERTIORARI
TO THE CIRCUIT COURT OF APPEALS FOR THE
SECOND CIRCUIT, WITH BRIEF IN SUPPORT
THEREOF.**

*To the Honorable, the Chief Justice and Associate Justices
of the Supreme Court of the United States:*

Your petitioner, American Bowling & Billiard Corporation, respectfully prays for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit to review the judgment of that Court entered herein on June 11, 1945.

A transcript of the record of the case, including the proceedings in said Circuit Court of Appeals, is furnished herewith in accordance with the rules of this Court.

**Summary and Short Statement of the
Matter Involved.**

1. Respondent, The Brunswick-Balke-Collender Company, is the oldest and largest manufacturer in the world of bowling alley equipment and accessories.

2. Petitioner, American Bowling & Billiard Corporation, also is engaged in the manufacture and sale of bowling alley equipment, and is a substantial competitor of respondent in that field.

3. Prior to the complaint in this action, respondent, for two consecutive years (1937 and 1938) conducted a promotional campaign called "Brunswick Sweepstakes" in which respondent offered prizes to bowlers throughout the United States who bowled on bowling alleys qualified under the plan. To qualify under the plan, respondent required the proprietors of bowling alleys to purchase from respondent a prescribed number of sets of pins and other supplies for each alley qualified, which purchase represented the seasonal requirement of the bowling alley proprietors for such pins and other supplies for each alley, and eliminated competition with respondent in the sale of such materials.

4. Prior to the complaint in this case the Federal Trade Commission instituted proceedings against respondent, identified as "In the Matter of The Brunswick-Balke-Clender Company, a Corporation, Docket No. 3604", charging respondent with violation of Section 3 of the Clayton Act (15 U. S. C. 14), by reason of respondent's so-called "Brunswick Sweepstakes" promotional plan.

5. On November 17, 1941 respondent instituted the present suit in the Southern District of New York charging petitioner with patent infringement and trade-mark infringement.

6. On March 23, 1942 petitioner filed its answer denying validity or infringement of both the patent and the trade-mark.

7. On December 7, 1942 the Federal Trade Commission filed its findings and conclusions in the proceeding

before it against the respondent, in which it was found and held that respondent, by its "Brunswick Sweepstakes" promotional plan, had violated Section 3 of the Clayton Act, and the Commission issued its "cease and desist order" as a result thereof (Vol. B, pp. 139-159). No appeal from this order was taken by respondent. To the contrary, the order was acquiesced in, and the "Brunswick Sweepstakes" plan was not thereafter perpetrated by respondent.

8. On January 11, 1943, promptly after the judgment of the Federal Trade Commission, petitioner, by stipulation, amended a counterclaim filed with its answer to charge respondent with violation of Section 3 of the Clayton Act by reason of respondent's "Brunswick Sweepstakes" promotional plan, praying for an accounting for the damages suffered by petitioner because thereof.

9. Trial was had of the cause beginning November 3, 1943. The evidence bearing on the issues of patent and trade-mark infringement was adduced. As to petitioner's counterclaim based on respondent's violation of Section 3 of the Clayton Act petitioner offered some evidence, but principally relied upon the effect of Section 5 of the Clayton Act (15 U. S. C. 16) by offering in evidence a copy of the findings, conclusions and order of the Federal Trade Commission in its hereinabove identified proceedings against respondent.

10. Section 5 of the Clayton Act (reproduced in full in the appendix hereto at p. 16) provides that:

"A final judgment or decree * * * in any suit or proceeding brought on or in behalf of the United States under the anti-trust laws to the effect that a defendant has violated said laws shall be *prima facie* evidence against such defendant in any suit or proceeding brought by any other party against such

defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto. * * *

11. The District Court refused to receive in evidence the order or decree of the Federal Trade Commission, wherefore it was properly identified and marked under the Rules of Civil Procedure for consideration by the Court of Appeals as to the propriety of such ruling (reproduced in the record at Vol. B, pp. 139-159).

The District Court held the respondent's patent to be not infringed, and held respondent's trade-mark to be valid and to have been infringed by petitioner. *

12. The only purchasers of bowling pins with which the evidence of the case is concerned are bowling alley proprietors. The District Court specifically found that there had not been, and under the facts of the case could not be any confusion between the trade-marked products of petitioner and respondent in the sale thereof to the only purchasers therefor, namely bowling alley proprietors. The District Court said (Vol. A, p. 110):

"We can take judicial notice of such a well known fact that bowling alleys are comparatively few in number, and while the evidence did not show how many there were, it did show that the trade, by which we mean the bowling alley owners, is a comparatively small and cohesive field for salesmen and thoroughly canvassed by both of the parties to this action. The evidence moreover discloses that the relations of manufacturer and bowling alley owner are intimate, the pins being but a small part of the

* Respondent's mark consisted of a red ring placed around the neck of bowling pins with red triangles extending upwardly from the ring in simulation of a crown. This was called "Red Crown", which words were separately registered. Petitioner's mark held to infringe consisted of a series of red diamonds connected to each other and extending around the neck of the pin.

alley's equipment. *The evidence leaves no room for inference, not to speak of a presumption, that any alley owner had any misapprehension whatever that arose from a confusion of trade marks. As a matter of fact, the plaintiff itself deserts any such claim but insists that the bowler is deceived by the defendant's use of its device.*" (Emphasis ours.)

13. As to the bowler (as distinguished from the purchaser of the pins) the District Court likewise held there was not, and on the facts of the case could not be any confusion. The Court said (Vol. B, p. 111):

"Neither mark is a mark at the 60 foot distance which separates the bowler and the pin and this distance is preserved by the foul line. We do not believe that anyone can be said to have a property right in the indistinct image or form which the plaintiff's mark must inevitably have to any eye so far from it nor do we believe that any findings can be made of its imitation by any equally distant and necessarily indistinct mark. Neither do we believe that any reasonable man has the right to rely on what he thinks he sees on the neck of a tenpin at that distance and claim to have been duped when he finds that he has been looking at another mark. Any finding depending on what a Judge thinks someone might or could see on an object of the size of a tenpin at 60 feet has no basis in determinable fact. *If anything was demonstrated to a conclusion at this trial it was that the bowler cannot identify such a mark.*" (Emphasis ours.)

14. Notwithstanding these findings by the District Court, that Court held petitioner's red diamond mark to be an infringement of respondent's red crown mark.

15. Both petitioner and respondent appealed to the Court of Appeals. On April 10, 1945 the Second Circuit Court of Appeals rendered its decision. The Court com-

prised Judge EVANS (of the Seventh Circuit) and Judges CLARK and FRANK (of the Second Circuit). Each of the Judges rendered an opinion in the case, and the Court divided among themselves on the issues presented, as follows:

- (1) As to the patent question, Judge FRANK (concurred with by Judge EVANS) declared the patent invalid without passing on infringement. Judge CLARK, in a separate opinion, dissented on the issue of validity, but indicated he favored affirmance for non-infringement.
- (2) On the trade-mark issue, Judge FRANK wrote the majority opinion (for Judges EVANS and CLARK) affirming the judgment of the District Court, but expressly dissented therefrom himself.
- (3) On the anti-trust law-Federal Trade Commission issue Judge FRANK, writing the majority opinion concurred in by Judge CLARK, reversed the District Court, finding error in its refusal to receive and give full effect to the judgment of the Federal Trade Commission under the provisions of Section 5 of the Clayton Act, Judge EVANS writing a dissenting opinion on this issue.

16. Thereafter petitioner made application for a rehearing of the trade-mark question, and respondent made application for rehearing (*inter alia*) of the anti-trust law-Federal Trade Commission question.

17. The petitions for rehearing were granted to the extent that on June 11, 1945 a *per curiam* opinion of the Court was filed (Vol. C, p. XXIX) withdrawing the prior opinion of the majority of the Court on the anti-trust law-Federal Trade Commission issue and unanimously affirming the judgment of the District Court in refusing to receive in evidence the judgment of the Federal Trade Commission

and to give the effect thereto which Section 5 of the Clayton Act provided.

18. Petitioner files this present petition requesting this Court to review:

- (1) The anti-trust law-Federal Trade Commission question of the case; as well as
- (2) The limited issue of trade-mark infringement.

The Questions Presented.

1. It is necessary to crystallize the issue in order to frame and permit a clear understanding of the questions presented by this petition on the anti-trust law-Federal Trade Commission aspect of the case.

Section 5 of the Clayton Act, as hereinbefore pointed out (*ante*, p. 3) establishes the *prima facie* effect of a "final judgment" obtained "in any suit or proceeding in equity brought by or in behalf of the United States under the anti-trust laws". Only once heretofore, so far as the law reports reveal, has a judgment of the Federal Trade Commission been proffered for the purpose of securing the *prima facie* effect prescribed by that section (*Propper v. John Beney & Sons*, 295 F. 729). In that case it was held, *inter alia* (by the District Court for the Eastern District of New York), that the judgment of the Federal Trade Commission was not a "final" judgment as required by the statute. Since that decision, however, the Federal Trade Commission Act was amended, to wit: on March 21, 1938 (15 U. S. C. 45(g)(1)) * whereby *every* order of the Commission was expressly made a "final" order upon the expiration of the time allowed for filing a petition for review (fixed by paragraph (c) of the amending section to within "60 days

* Reproduced in full in the appendix hereto at page 20.

of the date of service of the order"). Thereby, like all other injunctive decrees, one issued by the Commission, acquiesced in or unappealed from, legislatively became a "final judgment or decree". It will be recalled that the order or judgment of the Federal Trade Commission in its proceeding against respondent was entered on December 7, 1942—after the amendment to the Federal Trade Commission Act—and that respondent did not appeal therefrom so that the judgment of the Federal Trade Commission became a "final judgment or decree".

Respondent's petition for rehearing on this question gave as its basis (which was accepted by the Court of Appeals) that prosecution by the Federal Trade Commission for violation of Section 3 of the Clayton Act was controlled by Section 11 of that Act (15 U. S. C. 21) * and that although the Federal Trade Commission Act had been amended so that *every* order of the Commission became a "final" order if unappealed from, there was no finality of an order issued by the Commission in a prosecution for violation of Section 3 of the Clayton Act, and that there can be no finality therefor unless an adjudication is had by a Circuit Court of Appeals either on application by the Commission to enforce its order or on application by the respondent to vacate the order. In other words, it was the contention of the respondent, and the decision of the Court of Appeals on reconsideration, that because Section 11 of the Clayton Act had not been amended coincidentally with the amendment to the Federal Trade Commission Act, that amendment, giving finality to *all* orders of the Commission, was nullified in so far as was concerned any order of the Commission in a proceeding brought to enforce the Clayton Act. Obviously, the logical consequence of such reasoning is that where, as here, one

* Reproduced in full in the appendix hereto at page 16.

found to have violated Section 3 of the Clayton Act in a Federal Trade Commission proceeding could for all time defeat the benefits intended and prescribed by Section 5 of that Act by temporary dormancy (for a period determined by the statute of limitations of the particular State in which he was domiciled) or by acquiescence in and compliance with the order of the Commission.

Therefore, the questions presented on this aspect of the case are:

1. Did the amendment to the Federal Trade Commission Act, which made "final" *all* judgments or orders of the Commission if not appealed from within a prescribed period of time, leave non-final or interlocutory an order or judgment of the Commission in a proceeding which decreed that the respondent in that proceeding had violated the Clayton Act?
 2. Was it necessary to amend the Clayton Act in order to give finality to a judgment of the Commission (which was acquiesced in) that the respondent before it had violated the Clayton Act, when the amendment to the Federal Trade Commission Act made final *all* judgments of the Commission which were not appealed from?
 3. Was a judgment of the Federal Trade Commission entered on December 7, 1942, in the proceeding by the Commission against respondent for violation of Section 3 of the Clayton Act, entitled to receipt in evidence on petitioner's offer, and entitled to the *prima facies* prescribed by Section 5 of the Clayton Act?
2. On the trade-mark issues the question presented is specific and quite limited. The District Court found and

held that the only "purchasers" of the trade-marked goods were bowling alley proprietors, and that users of bowling alleys (the bowlers) were not "purchasers" of the trade-marked goods—they were merely *users* of the trade-marked goods. Together the alley proprietors and the bowlers constituted the entire "trade".

The District Court found that there was not and could not be any confusion between the trade-marked goods of petitioner and respondent insofar as the bowling alley proprietors were concerned, and, indeed, that respondent did not even claim that there was.

Insofar as the bowlers are concerned, the District Court found that there was not and could not be any confusion between the marks; that at the distance between the bowler and the pins upon which the marks appeared all marks would be indistinguishable; and that

"If anything was demonstrated to a conclusion on this trial it was that the bowler cannot identify such a mark" (Vol. A, p. III).

These findings by the District Court were adopted, undisturbed, by the Court of Appeals. Under such circumstances the question on this phase of the case is:

When it is established by the evidence and the findings of the Trial Court that there is not and can not be any confusion between the goods of petitioner and respondent with their respective trade-marks thereon, either to the purchasers or users of those goods (constituting the entire "trade" therefor), can there be trade-mark infringement?

Reasons Relied Upon for the Grant of the Writ of Certiorari.

The discretionary power of this Court is invoked upon the following grounds:

- (1) Because the decision of the Court of Appeals on rehearing, insofar as concerns the anti-trust law-Federal Trade Commission phase of the case, involves an important question of federal law which has not been but should be passed upon by this Court.
- (2) Because the questions presented are of great public importance.

WHEREFORE your petitioner respectfully prays that a writ of certiorari issue out of and under the seal of this Court, directed to the United States Court of Appeals for the Second Judicial Circuit, commanding said Court to certify and send to this Court, on a date to be designated, a full transcript of the record and all proceedings of the Court of Appeals had in this cause, to the end that this cause may be reviewed and determined by this Court as to the questions herein presented, and that the judgment of the Court of Appeals be reversed insofar as it held that the order of the Federal Trade Commission was inadmissible in evidence in this cause and not entitled to the legal effect prescribed therefor by Section 5 of the Clayton Act, and insofar as it held that there was trade-mark infringement on the facts and findings of the case; and that petitioner may be granted such other and further relief as may seem proper.

Respectfully submitted,

SAMUEL E. DARBY, JR.,
Counsel for Petitioner.

WILLIAM S. GLUCK,
WALTER A. DARBY,
Of Counsel.

BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI.

Opinions of the Courts Below.

The opinion of the District Court is reported in 60 U. S. P. Q. 294, and will be found in the record at Volume A, page 106.

The original opinion of the Court of Appeals for the Second Circuit will be found in the record at Volume C, page I, and is reported at 65 U. S. P. Q. 148.

The opinion of the Court of Appeals on rehearing is unreported, but will be found in the record at Volume C, page XXIX.

Jurisdiction.

The grounds for jurisdiction are:

1. The date of the judgment to be reviewed is April 10, 1945; opinion on rehearing June 11, 1945.

2. The judgment was rendered in a civil action involving patent and trade-mark infringement and accounting for damages resulting from violation of the anti-trust laws.

3. The statute under which jurisdiction is invoked is 240(a) of the Judicial Code, 28 U. S. C. 347, as amended by the Act of February 13, 1925.

4. Cases believed to sustain the jurisdiction are:

Moore v. New York Cotton Exch., 270 U. S. 593;

Sterling v. Constantin, 287 U. S. 378;

Hurn v. Oursler, 289 U. S. 238;

Stark Bros. Nurseries & Orchard Co. v. Stark, 255 U. S. 50.

Statement.

The facts are sufficiently stated in the petition.

Specification of Errors.

The errors which petitioner will urge, if the petition for writ of certiorari is granted, are that the Circuit Court of Appeals for the Second Circuit erred:

1. In affirming the action of the District Court excluding from evidence the judgment of the Federal Trade Commission to thereby deny petitioner the effect of such judgment prescribed by Section 5 of the Clayton Act.

2. In holding in effect that the judgment of the Federal Trade Commission, entered December 7, 1942, in its proceeding against respondent, was not a final judgment.

3. In holding in effect that the amendment to the Federal Trade Commission Act which made all orders of the Commission "final" did not make final an order of the Commission entered in the proceeding against respondent for violation of Section 3 of the Clayton Act.

4. In affirming the judgment of the District Judge that petitioner had infringed the trade-mark of respondent.

5. In holding in effect that although, as found by the District Judge, there was and could be no confusion between the trade-marked products of petitioner and respondent, petitioner infringed respondent's trade-mark.

Argument.

1. It is believed to be unnecessary to stress the novelty and importance of the anti-trust law-Federal Trade Commission aspect of this case. Congress amended the Federal Trade Commission Act so as to make "final" *all* orders of

the Federal Trade Commission unless appealed from. Such a "final order" is entitled to the *prima facies* prescribed by Section 5 of the Clayton Act.

The decision of the Court of Appeals in this case vitiates the purpose and effect of the amendment to the Federal Trade Commission Act, as well the Clayton Act, and permits one guilty of violation of the Clayton Act, either by dormancy (for the period prescribed by the statute of limitations in the State of domicile) or by acquiescence, to completely avoid the consequences of its violation statutorily prescribed by the Clayton Act. It would seem to require nothing beyond its mere statement to establish that if all orders of the Federal Trade Commission are given finality, an order of the Commission given in a proceeding involving prosecution for violation of Section 3 of the Clayton Act necessarily must be a final order regardless of whether or not the procedural provisions of the Clayton Act are concurrently amended.

So far as could be ascertained, this is the first time that this question has arisen, and its importance and far-reaching effect are believed to be apparent. Additionally, the difficulty that the Court of Appeals below had with the issue, as illustrated by its varying and conflicting opinions, shows the necessity for consideration thereof by this Court.

2. Similarly, with respect to the trade-mark issue involved, when the Trial Court found and held that there is and can be no confusion to purchasers or users of trade-marked commodities (representing the entire "trade" in the field) there would seem to be neither legal nor logical justification for a holding of trade-mark infringement with the financial and economic consequences usually flowing therefrom.

Conclusion.

WHEREFORE petitioner earnestly prays that the petition for writ of certiorari be granted, the cause be reviewed, and the judgment of the Court of Appeals for the Second Circuit be reversed in the respects hereinbefore noted.

Respectfully submitted,

SAMUEL E. DARBY, JR.,
Counsel for Petitioner.

WILLIAM S. GLUCK,
WALTER A. DARBY,
Of Counsel.

Dated: August , 1945.

APPENDIX

Section 5 of the Clayton Act (15 U. S. C. 16).

A final judgment or decree rendered in any criminal prosecution or in any suit or proceeding in equity brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any suit or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided*, This section shall not apply to consent judgments or decrees entered before any testimony has been taken.

Section 11 of the Clayton Act (15 U. S. C. 21).

Authority to enforce compliance with sections 13, 14, 18, and 19 of this title by the persons respectively subject thereto is hereby vested: In the Interstate Commerce Commission, where applicable to common carriers subject to chapters 1 and 8 of Title 49; in the Federal Communications Commission, where applicable to common carriers engaged in wire or radio communication or radio transmission of energy; in the Civil Aeronautics Board where applicable to air carriers and foreign air carriers subject to chapter 9 of Title 49; in the Board of Governors of the Federal Reserve System, where applicable to banks, banking associations, and trust companies; and in the Federal Trade Commission, where applicable to all other character of commerce, to be exercised as follows:

Whenever the commission or board vested with jurisdiction thereof shall have reason to believe that any person

is violating or has violated any of the provisions of said sections, it shall issue and serve upon such person a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the commission or board requiring such person to cease and desist from the violation of the law so charged in said complaint. Any person may make application, and upon good cause shown may be allowed by the commission or board, to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the commission or board. If upon such hearing the commission or board, as the case may be, shall be of the opinion that any of the provisions of said sections have been or are being violated, it shall make a report in writing in which it shall state its findings as to the facts, and shall issue and cause to be served on such person an order requiring such person to cease and desist from such violations and divest itself of the stock held or rid itself of the directors chosen contrary to the provisions of sections 18 and 19 of this title, if any there be, in the manner and within the time fixed by said order. Until a transcript of the record in such hearing shall have been filed in a circuit court of appeals of the United States, as hereinafter provided, the commission or board may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section.

If such person fails or neglects to obey such order of the commission or board while the same is in effect, the commission or board may apply to the circuit court of ap-

peals of the United States, within any circuit where the violation complained of was or is being committed or where such person resides or carries on business for the enforcement of its order, and shall certify and file with its application a transcript of the entire record in the proceeding, including all the testimony taken and the report and order of the commission or board. Upon such filing of the application and transcript the court shall cause notice thereof to be served upon such person and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the commission or board. The findings of the commission or board as to the facts, if supported by testimony, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material, and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the commission or board, the court may order such additional evidence to be taken before the commission or board and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The commission or board may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by testimony, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari as provided in sections 346 and 347 of Title 28.

Any party required by such order of the commission or board to cease and desist from a violation charged may obtain a review of such order in said circuit court of appeals by filing in the court a written petition praying that the order of the commission or board be set aside. A copy of such petition shall be forthwith served upon the commission or board, and thereupon the commission or board forthwith shall certify and file in the court a transcript of the record as hereinbefore provided. Upon the filing of the transcript the court shall have the same jurisdiction to affirm, set aside, or modify the order of the commission or board as in the case of an application by the commission or board for the enforcement of its order, and the findings of the commission or board as to the facts, if supported by testimony, shall in like manner be conclusive.

The jurisdiction of the Circuit Court of Appeals of the United States to enforce, set aside, or modify orders of the commission or board shall be exclusive.

Such proceedings in the circuit court of appeals shall be given precedence over other cases pending therein, and shall be in every way expedited. No order of the commission or board or the judgment of the court to enforce the same shall in any wise relieve or absolve any person from any liability under the antitrust laws.

Complaints, orders, and other processes of the commission or board under this section may be served by anyone duly authorized by the commission or board, either (a) by delivering a copy thereof to the person to be served, or to a member of the partnership to be served, or to the president, secretary, or other executive officer or a director of the corporation to be served; or (b) by leaving a copy thereof at the principal office or place of business of such person, or (c) by registering and mailing a copy thereof addressed to such person at his principal office or place of

business. The verified return by the person so serving said complaint, order, or other process setting forth the manner of said service, shall be proof of the same, and the return postoffice receipt for said complaint, order or other process registered and mailed as aforesaid shall be proof of the service of the same.

Amendment of March 21, 1938 to the Federal Trade Commission Act (15 U. S. C. 45 (g)(1)).

(g) An order of the Commission to cease and desist shall become final—

(1) Upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; but the Commission may thereafter modify or set aside its order to the extent provided in the last sentence of subsection (b).





(23)

SEP 22 1945

CHARLES ELMORE

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 378

AMERICAN BOWLING & BILLIARD CORPORATION,
Petitioner,

vs.

THE BRUNSWICK-BALKE-COLLENDER COMPANY,
Respondent,

**BRIEF OF RESPONDENT IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI.**

LEO F. TIERNEY,
Counsel for Respondent.

HARRY W. LINDSEY, JR.
THEODORE S. KENYON,
MAYER, MEYER, AUSTRIAN & PLATT,
Of Counsel.



INDEX

	PAGE
Opinions of the Courts Below.....	1
Statement of the Case.....	1
Argument	6
Point A. <i>Petitioner's Trade-Mark Infringement</i> <i>"Question" is Without Merit, and the</i> <i>Petition should be Denied as To It....</i>	6
Point B. <i>The Exclusion of the Order of the</i> <i>Federal Trade Commission from Evi-</i> <i>dence Involves no Conflict of Decisions</i> <i>and no Question of Federal Law which</i> <i>should be Settled by this Court.....</i>	6
Conclusion	10
Appendix	11

CITATIONS.

Cases:

Goodyear Tire and Rubber Co. v. Ray-D-Vacco, 321 U. S. 275, 278 (1944).....	6
National Billiard Supply Co., 43 U. S. P. Q. 10, (N. D. Ill., 1939).....	5
Southern Power Co. v. North Carolina Public Service Co., 263 U. S. 508 (1924).....	6
Twin Ports Oil Co. v. Pure Oil Co., 26 F. Supp. 366, 368-370 (D. Minn. 1939).....	8
United States v. Johnston, 268 U. S. 220, 227 (1925) .	6

Statutes:

The Clayton Act:

Section 3 (15 U. S. C. 14).....	7
Section 5 (15 U. S. C. 16).....	7, 8
Section 11 (15 U. S. C. 21).....	7, 8, 9

The Federal Trade Commission Act:

Section 5 (15 U. S. C. 45).....	8, 9, 11
---------------------------------	----------

Administrative Reports:

Annual Report of the Federal Trade Commission for the fiscal year ending June 30, 1944.....	9
--	---



IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 378

AMERICAN BOWLING & BILLIARD CORPORATION,
Petitioner,

vs.

THE BRUNSWICK-BALKE-COLLENDER COMPANY,
Respondent,

**BRIEF OF RESPONDENT IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI.**

I.

OPINIONS OF THE COURTS BELOW.

The District Court's opinion is reported at page 294 of 60 U. S. P. Q. and printed in the record at page 106 of Volume A. The Court of Appeals' original opinion and opinion on rehearing are reported at page 69 of 150 F. (2d), and are printed respectively at pages 32 and 52 of Volume C of the record.

II.

STATEMENT OF THE CASE.

Respondent for one hundred years has been engaged in the business of manufacturing and selling bowling alleys and bowling alley equipment, including bowling pins (Vol.

A, p. 30). In 1933 respondent adopted its registered Red Crown trade-mark "to once and for all eliminate any possibility of confusing a Brunswick pin with that of competitors * * * in the minds of the bowlers or the bowling alley proprietors" (Vol. A, p. 34). Respondent spent hundreds of thousands of dollars advertising its Red Crown trade-mark and has sold over ten million pins bearing that mark (Vol. A, pp. 34, 35).

Petitioner was not organized until 1937 (Vol. A, p. 42). In 1938 it adopted its infringing mark comprising a red band of connected diamonds. Before the infringing mark was adopted petitioner's attorney advised petitioner that it would be "treading on unsafe grounds" (Vol. A, p. 53) and propounded the question whether a bowler "is likely to mistake your product with the diamond mark thereon as a Brunswick-Balke-Collender Product." (Letter, Deft.'s Exh. D, Vol. A, p. 134). Several officers of petitioner compared pins, bearing the Red Crown marks and the Red Diamond band mark, from a distance of 60 to 65 feet and found that the Red Diamond band mark served their purpose as it was difficult to distinguish it from the Red Crown (Vol. A, pp. 43, 44).

All manufacturers of bowling pins, except petitioner, use distinctive marks, such as a blue band, a purple band, stars, spaced stripes, etc. (Vol. A, p. 102), around the necks of their pins so that bowlers may distinguish them. Respondent and petitioner prominently display their respective "Red Crown" and "Diamond" band trade-marks in their extensive advertising literature and much of respondent's literature is directed and prepared to appeal to the bowler (Vol. A, pp. 34 to 37). The mark has value to the alley owner or proprietor because "he satisfies his trade with that mark" and he "picks them out for the selling point" to the bowlers (Vol. A, pp. 55, 79).

The District Court found in its Finding of Fact No. 3 (Vol. A, p. 112):

*"Its (Petitioner's) selection of the mark was made with the knowledge that its likeness to the plaintiff's device was arguable. As composed, this mark constitutes an imitation that might mislead a buyer or a bowler into a belief that the defendant's pin was manufactured by the plaintiff."**

The District Court also found in its Opinion (Vol. A, p. 108):

"We find the defendant's device confusingly like the plaintiff's mark. The defendant's officers knew it might be thought so when they adopted it."

The Court of Appeals adopted these findings, saying in its Opinion (Vol. C, pp. 34, 35):

"There was evidence that at a distance of 60 to 65 feet, the two bands appeared similar. Plaintiff's band was on its two top grade pins. These pins sold at higher prices than those of defendant's. The two marks seem to the majority of the court to be confusingly similar. The identity of color, of location on the pin, of the upper half of the mark—all substantiate the trial court's finding: 'We find the defendant's device confusingly like the plaintiff's mark. The defendant's officers knew it might be thought so when they selected it. There was evidence that their composition of it was not only knowing but intended to create similarity but we decline to comment further'."

* * *

"Upon all the evidence, with all the possible conflicting inferences, the majority of the court feels required to accept the district court's findings on this disputed fact issue. Indeed, the majority considers that finding the correct view of the evidence, believing it in fact impossible to conclude other than that de-

*Italics ours throughout, unless otherwise indicated.

fendant adopted its mark because of its similarity to plaintiff's, which was used so extensively on plaintiff's pins."

Petitioner's sole "question" (p. 10) and its assignment of error (No. 5, p. 13), as to the trade-mark infringement issue are founded upon the false premise that the Trial Court made "findings" that "there is not and cannot be any confusion between the goods of petitioner and respondent with their respective trade-marks therein, either to the purchasers or users of those goods."

The Trial Court's Finding No. 3, from which we have quoted above, is to the direct contrary. It clearly negatives petitioner's false premise. So likewise does the holding of that Court in its opinion: "We find the defendant's device confusingly like the plaintiff's mark". No reference is made by petitioner either to this Finding or holding.

Petitioner's false premise cannot reasonably be spelled out of that portion of the District Court's Opinion quoted on page 5 of the petition. That portion has to do *only* with the question of damages because of petitioner's unfair competition. The Court had already stated in its Opinion that the marks were confusingly similar and that petitioner was guilty of infringement of respondent's registered trade-mark.

On page 10 of the petition is the further false premise that the Court of Appeals "adopted, undisturbed" several presumed findings of the District Court, including petitioner's imaginary one that there "could not be any confusion" on the part of bowlers. Indeed, the Court of Appeals held exactly the contrary, as shown by our above quotation from the Opinion of that Court.

The statements on page 10 of the petition that the District Court found "*all* marks would be indistinguishable"

to the bowler and that the Court of Appeals "adopted" such findings are also groundless in fact. Neither Court made any such finding and could not have done so properly in view of the evidence. It is most significant that while petitioner pretends that the marks have no significance to anyone, yet petitioner has doggedly persisted at great expense and inconvenience in using the infringing mark in the face of the filing of the suit, the District Court's decree and the Court of Appeals' affirmance. All other pin manufacturers have adopted distinctive marks around the necks of their pins.

We also challenge the statement appearing on pages 9 and 10 of the petition, that the District Court found that bowlers "were not purchasers of the trade-marked goods—they were merely users". There is no such finding. What the District Court *did* say was (Vol. C, p. 23):

"The suggestion was that the bowler is the ultimate consumer or the buyer. I was thinking of that proposition last night and today I am *convinced* that the Chicago judge did a fine job. I think that *the bowler is the buyer.*"

The District Court was referring to Judge Barnes' decision in respondent's suit against National Billiard Supply Co., (43 U. S. P. Q. 10, N. D. Ill., 1939), in which the Court found a wide red band to be confusingly similar to respondent's Red Crown mark and stated (p. 13) that "the ultimate consumers are the bowlers", who are "fussy" about the pins, and that "The proprietors of bowling alleys try to please them or deceive them."

There is no support in the record of this case for petitioner's statement (p. 2) that the pins and other supplies purchased under the "Sweepstakes" plan "represented the seasonal requirement of the bowling alley proprietors for such pins and other supplies for each alley,

and eliminated competition with respondent in the sale of such materials."

III.

ARGUMENT.

Point A. *Petitioner's Trade-Mark Infringement "Question" is Without Merit and The Petition Should Be Denied As To It.*

As Petitioner's "Question" and corresponding assignment of error are based on a premise which has no foundation in fact whatsoever—the contrary to the premise being the true fact—the petition as to the trade-mark matter is entitled to no standing in this Court and should be denied.

There are *concurrent* findings as to the matter of confusion, and evidence supporting them, and under such circumstances this Court has repeatedly and consistently held it would not disturb such findings. *Goodyear Tire and Rubber Co. v. Ray-D-Vacco*, 321 U. S. 275, 278 (1944).

The *only* ground upon which petitioner (p. 11) invokes the discretionary power of this Court on the trade-mark "Question" is that it is "of great public importance". Even if that question were not based on a false premise it would not be of public interest. It involves merely a question of fact of interest only to the parties to this private suit. This Court has repeatedly and consistently held that it will not grant a petition for writ of certiorari under such circumstances. *Southern Power Co. v. North Carolina Public Service Co.*, 263 U. S. 508 (1924); *United States v. Johnston*, 268 U. S. 220, 227 (1925).

Point B. *The Exclusion of the Order of the Federal Trade Commission From Evidence Involves No Conflict of Decisions and No Question of Federal Law Which Should Be Settled By This Court.*

The petition for a writ of certiorari proposes that the question of the admissibility in evidence, pursuant to Section 5 of the Clayton Act (15 U. S. C. 16), of an order of the Federal Trade Commission made pursuant to Section 11 of the Clayton Act (15 U. S. C. 21) and finding a violation of Section 3 of the Clayton Act (15 U. S. C. 14), is an important question of federal law which should be passed upon by this Court. Respondent submits, however, that there is no occasion for consideration of the question by this Court since the answer is obvious upon the face of the pertinent statutes.

To come within the provisions of Section 5 of the Clayton Act (15 U. S. C. 16) there must, among other requirements, be presented a "final judgment or decree rendered in any criminal prosecution or in any suit or proceeding in equity * * *." Obviously, an order of the Federal Trade Commission, made pursuant to Section 11 of the Clayton Act (15 U. S. C. 21), was rendered in an administrative proceeding and not in a "criminal prosecution" or in a "suit or proceeding in equity."

The Clayton Act does not confer jurisdiction solely upon the Federal Trade Commission to enforce its provisions. Jurisdiction is also conferred upon other administrative agencies to enforce compliance with Sections 2, 3, 7 and 8 by persons respectively subject thereto (Section 11, 15 U. S. C. 21). The procedure outlined in Section 11 is uniformly applicable to each of said administrative agencies.¹

A comparison of the use of the language "suit or proceeding in equity" in Section 5 of the Act (15 U. S. C. 16) with the use of the term "proceeding" in Section 11 (15 U. S. C. 21) shows that the words "suit or proceeding in equity" were used designedly by the Congress.

¹ Interstate Commerce Commission, Federal Communication Commission, Civil Aeronautics Board, Board of Governors of the Federal Reserve System and Federal Trade Commission.

Neither is such an order of the Federal Trade Commission a "judgment or decree" as that term is used in Section 5 of the Clayton Act (15 U. S. C. 16). It is merely an administrative order. This distinction was also understood by the Congress, as can be seen upon a comparison of the use of the term "order" in Section 11 of the Act with the use of the terms "judgment or decree" in Section 5 and "judgment" in Section 11.

Moreover, such an order of the Federal Trade Commission is not "final" in that it remains open to appeal upon petition to a Circuit Court of Appeals and may be modified or set aside by the Federal Trade Commission at any time. By the provisions of Section 5 of the Clayton Act it was not intended that a final judgment for damages be entered upon the evidence of an order of the Federal Trade Commission, where the order might be modified, set aside or reversed after the judgment for money damages had become final. *Twin Ports Oil Co. v. Pure Oil Co.*, 26 F. Supp. 366, 368-370 (D. Minn. 1939).

~~Petitioner~~
~~Respondent~~ has suggested that an amendment to the Federal Trade Commission Act, 15 U. S. C. 45(g)(1), has in some way resulted in an amendment to Section 11 of the Clayton Act (15 U. S. C. 21), with the result that orders of the Federal Trade Commission, pursuant to the latter Act, become final by reason of the amendment to the former. It is apparent from a reading of 15 U. S. C. 45 that all of its provisions refer to proceedings of the Federal Trade Commission pursuant to the power granted by 15 U. S. C. 45(a). The lack of any relationship whatsoever between 15 U. S. C. 45 and 15 U. S. C. 21 becomes apparent upon a comparison of the pecuniary penalty for violation of the Commission's order imposed by 15 U. S. C. 45(1) to be recovered in a civil action with the provisions of 15 U. S. C. 21 for the enforcement of orders of the Federal Trade

Commission and the other administrative agencies by Circuit Courts of Appeal. The provisions of 15 U. S. C. 45(g) regarding finality do not, as petitioner would have us believe, speak of *all* orders, but refer only to orders of the Federal Trade Commission made pursuant to the grant of power in 15 U. S. C. 45(a).

~~Petitioner's~~
~~Respondent's~~ suggestion that the amendment to 15 U. S. C. 45, a part of the Federal Trade Commission Act, is applicable to orders of the Federal Trade Commission made pursuant to Section 11 of the Clayton Act (15 U. S. C. 21) would result, without reason, in having the provisions of the Clayton Act enforced by a different procedure by the Federal Trade Commission from that prescribed to be followed by the other administrative agencies. The Federal Trade Commission Act (15 U. S. C. 45), the amendment to which petitioner relies upon, contrary to the Clayton Act, is applicable only to the Federal Trade Commission. It is obvious that no change was intended by this amendment in the legislative purpose to provide a uniform procedure for enforcement of the Clayton Act by all of the administrative bodies mentioned in Section 11 of the Clayton Act (15 U. S. C. 21). The administrative interpretation of the procedural provisions of Section 11 of the Clayton Act (15 U. S. C. 21) and of the Federal Trade Commission Act (15 U. S. C. 45) is consistent with respondent's position. In the annual report of the Federal Trade Commission for the fiscal year ending June 30, 1944, page 22, the following appears:

"Under the Clayton Act, an order to cease and desist does not become final by lapse of time. The order must be affirmed by a United States circuit court of appeals on application for review by the respondent or upon petition of the Commission for enforcement. Thereafter, appropriate contempt proceedings may be brought in the particular court of appeals for violation of the court order."

IV.

CONCLUSION.

There are no "specil and important reasons" for granting the present petition; certainly none of the character of those specified in Rule 38 of this Court. We submit that the petition should be denied.

Respectfully submitted,

LEO F. TIERNEY,
Counsel for Respondent.

HARRY W. LINDSEY, JR
THEODORE S. KENYON,
MAYER, MEYER, AUSTRAN AND PLATT,
Of Counsel.

Dated: September 19, 1945.





APPENDIX.

UNITED STATES CODE (1940) TITLE 15, SECTION 45**“§ 45. UNFAIR METHODS OF COMPETITION UNLAWFUL; PREVENTION BY COMMISSION—(a) DECLARATION OF UNLAWFULNESS; POWER TO PROHIBIT UNFAIR PRACTICES.**

Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.

The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to chapter 9 of Title 49, and persons, partnerships, or corporations subject to sections 181-203, 205-228 and 229 of Title 7, except as provided in section 227 of said title, from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

(b) PROCEEDING BY COMMISSION; MODIFYING AND SETTING ASIDE ORDERS.

Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation, a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at

a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the Commission to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission. If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by sections 41-46 and 47-58 of this title, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice. Until the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, or, if a petition for review has been filed within such time then until the transcript of the record in the proceeding has been filed in a circuit court of appeals of the United States, as hereinafter provided, the Commission may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section. After the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, the Commission may at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part, any report or order

made or issued by it under this section, whenever in the opinion of the Commission conditions of fact or of law have so changed as to require such action, or if the public interest shall so require: *Provided, however,* That the said person, partnership, or corporation may, within sixty days after service upon him or it of said report or order entered after such a reopening, obtain a review thereof in the appropriate circuit court of appeals of the United States, in the manner provided in subsection (c) of this section.

(c) REVIEW OF ORDER; REHEARING.

Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the circuit court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business, by filing in the court, within sixty days from the date of the service of such order, a written petition praying that the order of the Commission be set aside. A copy of such petition shall be forthwith served upon the Commission, and thereupon the Commission forthwith shall certify and file in the court a transcript of the entire record in the proceeding, including all the evidence taken and the report and order of the Commission. Upon such filing of the petition and transcript the court shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, evidence, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the Commission, and enforcing the same to the extent that such order is affirmed, and to issue such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public or to competitors *pendente lite*. The

findings of the Commission as to the facts, if supported by evidence, shall be conclusive. To the extent that the order of the Commission is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of such order of the Commission. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in section 347 of Title 28.

(d) JURISDICTION OF COURT.

The jurisdiction of the circuit court of appeals of the United States to affirm, enforce, modify, or set aside orders of the Commission shall be exclusive.

(e) PRECEDENCE OF PROCEEDINGS; EXEMPTION FROM LIABILITY.

Such proceedings in the circuit court of appeals shall be given precedence over other cases pending therein, and shall be in every way expedited. No order of the Commission or judgment of court to enforce the same shall in

anywise relieve or absolve any person, partnership, or corporation from any liability under the Antitrust Acts.

(f) SERVICE OF COMPLAINTS, ORDERS AND OTHER PROCESSES; RETURN.

Complaints, orders, and other processes of the Commission under this section may be served by anyone duly authorized by the Commission, either (a) by delivering a copy thereof to the person to be served, or to a member of the partnership to be served, or the president, secretary, or other executive officer or a director of the corporation to be served; or (b) by leaving a copy thereof at the residence or the principal office or place of business of such person, partnership, or corporation; or (c) by registering and mailing a copy thereof addressed to such person, partnership, or corporation at his or its residence or principal office or place of business. The verified return by the person so serving said complaint, order, or other process setting forth the manner of said service shall be proof of the same, and the return post office receipt for said complaint, order, or other process registered and mailed as aforesaid shall be proof of the service of the same.

(g) FINALITY OF ORDER.

An order of the Commission to cease and desist shall become final—

(1) Upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; but the Commission may thereafter modify or set aside its order to the extent provided in the last sentence of subsection (b); or

(2) Upon the expiration of the time allowed for filing a petition for certiorari, if the order of the Commission has been affirmed, or the petition for review dismissed

by the circuit court of appeals, and no petition for certiorari has been duly filed; or

(3) Upon the denial of a petition for certiorari, if the order of the Commission has been affirmed or the petition for review dismissed by the circuit court of appeals; or

(4) Upon the expiration of thirty days from the date of issuance of the mandate of the Supreme Court, if such Court directs that the order of the Commission be affirmed or the petition for review dismissed.

(h) SAME; ORDER MODIFIED OR SET ASIDE BY SUPREME COURT.

If the Supreme Court directs that the order of the Commission be modified or set aside, the order of the Commission rendered in accordance with the mandate of the Supreme Court shall become final upon the expiration of thirty days from the time it was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected to accord with the mandate, in which event the order of the Commission shall become final when so corrected.

(i) SAME; ORDER MODIFIED OR SET ASIDE BY CIRCUIT COURT OF APPEALS.

If the order of the Commission is modified or set aside by the circuit court of appeals, and if (1) the time allowed for filing a petition for certiorari has expired and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the court has been affirmed by the Supreme Court, then the order of the Commission rendered in accordance with the mandate of the circuit court of appeals shall become final on the expiration of thirty days from the time such order of the Commission was rendered, un-

less with such thirty days either party has instituted proceedings to have such order corrected so that it will accord with the mandate, in which event the order of the Commission shall become final when so corrected.

(j) SAME; REHEARING UPON ORDER OR
REMAND.

If the Supreme Court orders a rehearing; or if the case is remanded by the circuit court of appeals to the Commission for a rehearing, and if (1) the time allowed for filing a petition for certiorari has expired, and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the court has been affirmed by the Supreme Court, then the order of the Commission rendered upon such rehearing shall become final in the same manner as though no prior order of the Commission had been rendered.

(k) DEFINITION OF MANDATE.

As used in this section the term 'mandate', in case a mandate has been recalled prior to the expiration of thirty days from the date of issuance thereof, means the final mandate.

(l) PENALTY FOR VIOLATION OF ORDER.

Any person, partnership, or corporation who violates an order of the Commission to cease and desist after it has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than \$5,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the United States. (Sept. 26, 1914, ch. 311, § 5, 38 Stat. 719; Feb. 13, 1925, ch. 229, § 2, 43 Stat. 939; Mar. 21, 1938, ch. 49, § 3, 52 Stat. 111; June 23, 1938, ch. 601, § 1107 (f), 52 Stat. 1028.)"